SUPREME COURT
OF STATE OF WASHINGTON

TACOMA NEWS, INC., a Washington corporation, d/b/a THE NEWS TRIBUNE,

Petitioner,

v.

THE HONORABLE JAMES D. CAYCE,

Respondent.

NO. 83645-1

MEMORANDUM IN SUPPORT OF MANDAMUS ACTION AGAINST STATE OFFICER

I. INTRODUCTION

This action results from the Order of the Honorable James D. Cayce precluding The Tacoma News Inc. and the public from attending a judicial proceeding in the criminal trial of *State v. Michael Andrew Hecht,* Cause No. 09-1-01051-1. Hecht, a Pierce County Superior Court Judge, is on trial for felony harassment and patronizing a prostitute. As this Court has previously explained "[o]pen access to government institutions is fundamental to a free and democratic society. Open access to the courts is grounded in our common law heritage and our national and state constitutions. For centuries publicity has been a check on the misuse of both political and judicial power." *Dreiling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861 (2004). It is difficult to imagine a case where this check is more critical here where an active Superior Court judge is the subject of a felony criminal trial.

On September 21, 2009, Judge Cayce issued an Order excluding Tacoma News, Inc., d/b/a The News Tribune ("The News Tribune") and the public from a court hearing in which the State's key witness, Joseph Pfieffer provided testimony after the State acquired Mr. Pfieffer's attendance by warrant. The majority of the proceeding occurred in open court, both parties questioned Mr. Pfieffer, and Judge Cayce is believed to have ruled on objections throughout the proceeding. Once The News Tribune's reporter and Counsel for the paper entered the courtroom, the proceeding stopped. Judge Cayce held that the proceeding was nothing more than a deposition, which could occur in a private law office and then closed the courtroom to the public. In reaching this conclusion, Judge Cayce determined that *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 35, 640 P.2d 716 (1982) was inapplicable because this was a criminal deposition, and therefore, he did not believe it was necessary to consider any of the five *Ishikawa* requirements.

The News Tribune seeks the issuance by this Court of a writ of mandamus directing the Honorable James D. Cayce to provide a copy of all transcripts and videotaped testimony taken during the hearing on September 21, 2009 and directing the Court to keep all further similar proceedings in the trial of *State of Washington v. Michael Andrew Hecht,* Cause No. 09-1-01051-1, open to the press and public, unless the Court first complies with the requirements of *Seattle Times Co. v. Ishikawa.*

II. JURISDICTION

This Court has held that "[m]andamus by an original action in this court is a proper form of action for third party challenges to closure orders in criminal proceedings." *Seattle Times co. v. Ishikawa*, 97 Wn.2d 30, 35, 640 P.2d 716 (1982). See also, RAP 16.2.

III. CONSTITUIONAL PROTECTED ACCESS FOR THE PRESS TO CRIMINAL COURT PROCEEDINGS

Both the Federal and Washington State Constitutions protect the public's right to access to criminal trials. With respect to the United States Constitution, the First and Fourteenth Amendments secure this right. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). Likewise, Washington's Constitution also establishes a right of access to court proceedings by stating, in relevant part: "Justice in all cases shall be administered openly . . ." Constitution Article I, Section 10. "This guarantees the public and the press a right of access to judicial proceedings and court documents in both civil and criminal cases." *Dreiling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861, 866 (2004). This Court has confirmed that this entitles the public to openly administered justice. *Cohen v. Everett City Council*, 85 Wn2d 385, 388, 535 P.2d 801 (1975). The same case confirms that the press is part of that public. *Id.*

IV. CLOSING THE COURTROOM IN THIS CASE WAS IMPROPER

Judge Cayce closed the courtroom to the public without following the procedures established in the case of *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982). In *Ishikawa*, the Court ruled that before a closure of access to a trial is ordered, the court must go through a process for analyzing alternatives and, after completing that process, must issue findings setting forth the basis for its decision and why the restrictions are the least restrictive means of protecting the competing interest of public access to the Courts. Here, the reason given by Judge Cayce for determining that *Ishikawa* did not apply was that the hearing was simply a deposition and the situation is no different than if a deposition was occurring in a private law office.

Judge Cayce's decision that *Ishikawa* does not apply is incorrect. First, the testimony of Joseph Pfeiffer took place in Court, not a private office. In fact, this was a judicial proceeding where Judge Cayce presided over the examination, presumably ruling on objections, and both parties questioned the witness. Indeed, this instance may well be the only time Mr. Pfeiffer will testify live during these proceedings. Most importantly, the *Ishikawa* opinion states unambiguously that its standards apply to all courtroom closures: "Each time restrictions on access to criminal hearings or the records from hearings are sought, courts must follow these steps[.]" *Ishikawa*,

97 Wn.2d at 35. Judge Cayce's determination that *Ishikawa* did not apply was in error.

V. Application Of *Ishikawa* To This Case Demonstrates That The Court Closure Was In Error

Although Judge Cayce did not apply *Ishikawa* to the September 21, 2009 hearing because he determined that the case was inapplicable, if he had applied this Court's precedent, the result is that the courtroom closure was inappropriate. In *Ishikawa*, the Supreme Court explained as follows:

> Each time restrictions on access to criminal hearings or the records from hearings are sought, courts must follow these steps:
>
> 1. The proponent of closure and/or sealing must make some showing of the need therefor. [ ]In demonstrating that need, the movant should state the interests or rights which give rise to that need as specifically as possible without endangering those interests. The quantum of need which would justify restrictions on access differs depending on whether a defendant's Sixth Amendment right to a fair trial would be threatened. When closure and/or sealing is sought to protect that interest, only a "likelihood of jeopardy" must be shown. [ ]However, since important constitutional interests would be threatened by restricting public access [ ], a higher threshold will be required before court proceedings will be closed to protect other interests. If closure and/or sealing is sought to further any right or interest besides the defendant's right to a fair trial, a "serious and imminent threat to some other important interest" must be shown. The burden of persuading the court that access must be restricted to prevent a serious and imminent threat to an

important interest shall be on the proponent unless closure is sought to protect the accused's fair trial right. Because courts are presumptively open, the burden of justification should rest on the parties seeking to infringe the public's right. . . . .

2. "Anyone present when the closure (and/or sealing) motion is made must be given an opportunity to object to the (suggested restriction)". [ ] For this opportunity to have meaning, the proponent must have stated the grounds for the motion with reasonable specificity, consistent with the protection of the right sought to be protected. At a minimum, potential objectors should have sufficient information to be able to appreciate the damages which would result from free access to the proceeding and/or records. This knowledge would enable the potential objector to better evaluate whether or not to object and on what grounds to base its opposition.

3. The court, the proponents and the objectors should carefully analyze whether the requested method for curtailing access would be both the least restrictive means available and effective in protecting the interests threatened. If limitations on access are requested to protect the defendant's right to a fair trial, the objectors carry the burden of suggesting effective alternatives. If the endangered interests do not include the defendant's Sixth Amendment rights, that burden rests with the proponents.

4. "The court must weigh the competing interests of the defendant and the public,"[ ] and consider the alternative methods suggested. Its consideration of these issues should be articulated in its findings and conclusions, which should be as specific as possible rather than conclusory. []

5. "The order must be no broader in its application or duration than necessary to serve its purpose...." [ ] If the order involves sealing of records, it shall apply for a specific time period with a burden on the proponent

> to come before the court at a time specified to justify continued sealing.

Ishikawa, 97 Wn.2d at 37-39.

Here, consideration of these factors demonstrates that the proceeding should have remained open. First, Judge Hecht's Sixth Amendment right to a fair trial is not at stake. Mr. Pfeiffer has already provided signed statements that he had sex with Judge Hecht in exchange for money. Ex. B to Beck Decl. This is certainly the exact area of testimony elicited during the September 21, 2009 hearing. While these facts are no doubt embarrassing, they are the substance of the public charges against Judge Hecht. More importantly, these facts are already in the public record. Shielding the live testimony from the State's key witness does nothing to further the administration of justice.

Assuming *arguendo* there were some concerns about Judge Hecht's Sixth Amendment right to a fair trial due to pre-trial publicity, there are a number of options available, including the use of jury questionnaires, voir dire, or even change of venue. Apparently, voir dire efforts were successful during jury selection when the case was first set for trial in early September.

Because there was no legal basis to close the courtroom in this case, and even if there was a legitimate concern, there are less restrictive means, under *Ishikawa* closing the courtroom was in error.

VI. THIS COURT SHOULD ORDER THE PROMPT DISCLOSURE OF THE TRANSCRIPT AND VIDEO

The direct and cross-examination of Mr. Pfeiffer occurred in open court. As such, there is no basis to keep that testimony hidden from the public.

Regarding the portions of the hearing that occurred once the proceeding was closed, the public should also have access to that portion of the hearing because the courtroom was incorrectly closed for the reasons set forth above.

Dated this 22nd day of September, 2009.

Respectfully submitted,

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